UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SUSIE ABRAM,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.

Defendants.
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No. C 07-3006 PJH

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment came on for hearing before this court on July 23, 2008. Plaintiff Susie Abram ("plaintiff"), appeared through her counsel, Curtis G. Oler. Defendants City and County of San Francisco ("the City") and William Frazier ("Frazier")(collectively "defendants"), appeared through their counsel, Jonathan C. Rolnick. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS defendants' motion for summary judgment, for the reasons stated at the hearing, and as follows.

BACKGROUND

This is an employment discrimination case. Plaintiff Susie Abram is African American, and a former employee of defendant City and County of San Francisco. Plaintiff alleges that she began work as an activity therapist for the City's Department of Public Health at Laguna Honda Hospital on April 4, 1982. During the relevant time period, plaintiff worked under the supervision of individual defendant William Frazier, the Director of Therapeutic Activities at Laguna Honda, and under the direct supervision of Christine Hanson, an Activity Therapist Supervisor at Laguna Honda.

As an activity therapist, plaintiff worked with an interdisciplinary team of health care professionals to deliver certain services addressing the social and physical needs of the residents the hospital including creating and planning on and off-campus activities for them. See Declaration of Jonathan Rolnick ISP Summ. Judg. ("Ronlick Decl."), Ex. A at 10-11, 12-14. Specifically, plaintiff worked with residents on the D3 psycho social cluster during the alleged time period in question.

Plaintiff continued to work at Laguna Honda until on or about June 24, 2004, after which plaintiff asserts that she was "compelled to officially resign from [her] position." See Complaint for Declaratory Relief, Injunctive Relief and Damages ("Complaint"), ¶ 6. Plaintiff alleges that her resignation was compelled due to defendants' unlawful discriminatory employment practices, including false performance evaluations of plaintiff; unwarranted threats of disciplinary actions; unwarranted disciplinary actions; humiliation; unwarranted close scrutiny; continuing harassment; and continuing hostility. Id. at ¶ 8. Plaintiff asserts that these actions were taken against her because of her race, color, and national origin, and in retaliation for plaintiff's continuing protests of discriminatory conduct. Id. at ¶ 9.

To that end, plaintiff filed her complaint against the City and County of San Francisco and William Frazier (collectively "defendants") on June 8, 2007. Plaintiff's complaint alleges a single cause of action for violation of 42 U.S.C. § 1981. See Complaint, Prayer for Relief.

Defendants now move for summary judgment with respect to plaintiff's section 1981 claim.

DISCUSSION

A. Legal Standard

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). Material facts are those which may affect the outcome of

the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The court must view the facts in the light most favorable to the non-moving party and give it the benefit of all reasonable inferences to be drawn from those facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

B. Analysis

The only issue before the court is whether summary judgment on plaintiff's section 1981 claim is warranted. Section 1981 prohibits intentional discrimination in the "benefits, privileges, terms and conditions" of employment. See 42 U.S.C. § 1981(b); Metoyer v. Chassman, 504 F.3d 919, 935 (9th Cir.2007); see also Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982)(claims under section 1981 are limited to proof of intentional discrimination).

Analysis of an employment discrimination claim under § 1981 follows the same legal principles as those applicable in a Title VII discrimination case. Id. at 930; see also Surrell v. Cal. Water Serv. Co., 518 F.3d 1097, 1103 (9th Cir. 2008). Those legal principles in turn require adherence to the same test for establishing an inference of intentional discrimination as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See also Yee v. Dept. of Environ. Serv., Multnomah County, 826 F.2d 877, 880-81 (9th Cir.1987). Under the familiar McDonnell Douglas framework, a Title VII (and by extension, a section 1981) claimant has the initial burden of establishing a prima facie case of racial discrimination. If the plaintiff satisfies this initial burden, the burden shifts to the defendant to prove it had a legitimate non-discriminatory reason for the adverse action. If the defendant meets that burden, the plaintiff must then prove that such a reason was merely a pretext for intentional discrimination. See, e.g., Lindsey v. SLT L.A., LLC, 447 F.3d 1138, 1144 (9th Cir.2006).

Here, defendants target three theories of liability that plaintiff asserts as a basis for a

section 1981 violation: race discrimination, retaliation, and hostile workplace harassment. Defendants argue that proof of each fails under the relevant McDonnell Douglas burden-shifting approach, thereby warranting summary judgment in defendants' favor. Additionally, they assert that summary judgment as to the City is warranted due to plaintiff's failure to establish an issue of fact as to Monell liability.

Each issue is considered in turn.

1. Race Discrimination

Plaintiff claims unlawful race discrimination on the basis of two separate incidents: first, a disciplinary action initiated against her in August 2003 and second, a disciplinary action initiated against her in October 2003, both of which were allegedly being pursued by defendants at the time of plaintiff's resignation in June 2005.[1] See Opp. Br. at 4:18-21. Declaration of Christine Hanson ISO Summ. Judg. ("Hanson Decl."), Exs. H, I. The August 2003 disciplinary action was initiated by Hanson by way of an Employee Conference Form, in which Hanson charged plaintiff with inattention to duty, failure to professionally manage a "cluster wide" activity, and dishonesty. See id. at Ex. H. The charges stemmed from a "summer/garage sale" that plaintiff had organized for the Laguna Honda residents. While Hanson recommended a 2 day disciplinary suspension, plaintiff objected to the report, and the charges were reviewed by Frazier, who ultimately reduced the suspension to 1 day. See id. at CCSF 00298-300, CCSF 00302-03. The October 2003 disciplinary action was also initiated by Hanson, who once again charged plaintiff with inattention to duty, and specifically with failure to meet the developmental goals that had been set for plaintiff in summer 2003, and failure to follow through with planned activities. See Hanson Decl., Ex. I at CCSF 00107-113. This disciplinary action, too, was reviewed by Frazier, who ultimately ordered a 2 day disciplinary suspension. See id. at CCSF 00115.

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[1] Due to plaintiff's concession that her claim is premised upon these two disciplinary actions only, defendant's argument that several of plaintiff's *other* possible allegations are barred by the statute of limitations, is moot, particularly since defendants appear to concede that the two disciplinary actions in question properly fall within the applicable statutes of limitations.

To establish her initial prima facie case of race discrimination based on these incidents, plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified for his position; (3) she experienced an adverse employment action; and (4) similarly situated individuals outside her protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. See, e.g., Fonseca v. Sysco Food Services of Arizona, Inc., 374 F.3d 840, 847 9th Cir. 2004); McDonnell Douglas Corp., 411 U.S. 792 at 802. Only then does the burden shift to defendants to offer their "legitimate, nondiscriminatory reason for the adverse employment action." Lyons v. England, 307 F.3d 1092, 1112 (9th Cir.2002).

Here, the court's analysis begins – and ends – with plaintiff's prima facie case. Plaintiff successfully meets the first and third prongs of the above McDonnell Douglas test. It is undisputed that plaintiff is African American, and that she was, in fact, the recipient of the two disciplinary actions mentioned above. As such, plaintiff can establish that she is a member of a protected class, and that she suffered some adverse employment action. See, e.g., Saint Francis College v. Al-Khazraji, 481 U.S. 604, 612-13 (1987)(protected classes are those identifiable because of their ancestry or ethnic characteristics); Woodson v. Int'l Business Machines, 2006 WL 1195453, *4-5 (N.D. Cal. 2006)(defining adverse action as a substantial change in the terms and conditions of employment that can include a "reduction in an employee's potential for career advancement").

Plaintiff fails, however, to meet the second and fourth prongs of the McDonnell Douglas test. She has failed to establish either that she was performing according to defendants' legitimate expectations, or that other employees with qualifications similar to her own were treated more favorably. Indeed, while plaintiff states that the "substantial credible evidence in the record easily demonstrates that [she] has established a prima facie case for racial discrimination...," see Opp. Br. at 5:22-24, plaintiff fails to introduce even minimal evidence – aside from her own declaration – that might prove that her job performance met defendants' legitimate expectations. Such evidence might normally

consist of positive performance reviews, admissions by the employer, or even expert testimony as to an employer's legitimate expectations for the job at issue, and an analysis of the plaintiff's performance in light of those expectations. Similarly, with respect to whether similarly situated employees not in her protected class were treated more favorably, plaintiff has provided no evidence other than her own conclusory declaration that fails to identify any comparators. She has provided no declarations from other employees or supervisors or even statistical evidence on this issue.

As for plaintiff's own declaration, it is wholly insufficient to give rise to an inference of discrimination as it is comprised almost exclusively on improperly overbroad and conclusory language. While plaintiff states that paragraphs 20-22, 27, and 32-36 of her declaration sufficiently establish her prima facie case, for example, those paragraphs contain no particularized or detailed facts – just conclusory statements that defendants' actions were unwarranted, and that other unidentified "white counterparts" were not subjected to the same discipline. See Abram's Decl. ISO Opp., ¶¶ 32-26. This evidence does not rise to the level sufficient to create a material dispute of fact with respect to a prima facie case of discrimination.

Moreover, as the Ninth Circuit has stated, plaintiff's subjective belief, without more, that the challenged employment action was unwarranted, or unnecessary, cannot create a genuine issue of material fact. See Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270 (9th Cir.1996)(concluding, despite the plaintiff's claims that she had performed her job well, that "an employee's subjective personal judgments of her competence alone do not raise a genuine issue of material fact"). Plaintiff's declaration contains precisely the type of subjective statements of belief that the Ninth Circuit has held fail to create a genuine dispute of material fact.

Finally, even if plaintiff had been able to come forward with evidence of a prima facie case of discrimination, defendants provided evidence of legitimate and nondiscriminatory reasons for the two disciplinary actions in question. Defendants have submitted evidence,

for example, of plaintiff's May 2003 performance appraisal and developmental plan, and the disciplinary actions themselves, as well as the testimony of Frazier and Hansen, in support of the very real job performance difficulties that plaintiff was experiencing. See, e.g., Frazier Decl. ISO MSJ, ¶¶ 24-25, 30-31, 32-33, Exs. G, I, J; Hansen Decl. ISO MSJ, ¶¶ 13-15, 21-22, 25-26, Exs. F-I. Yet, once again, the only evidence of pretext that plaintiff has introduced to discharge her burden under the McDonnell Douglass framework, is plaintiff's declaration. And just as that declaration, standing alone, was insufficient to establish plaintiff's prima facie case, it is also insufficient to establish pretext. See Cornwell v. Electra Cent. Credit Union, 439 F.3d 1018, 1028 fn. 6 (9th Cir. 2006)(a plaintiff "may not defeat a defendant's motion for summary judgment merely by denying the credibility of the defendant's proffered reason for the challenged employment action."); Schuler v. Chronicle Broad. Co., 793 F.2d 1010, 1011 (9th Cir.1986).

In sum, although minimal evidence is sufficient to establish a prima facie case, "when evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate." Lindsey v. SLT L.A., LLC, 447 F.3d at 1148 (internal quotation marks omitted). Here, plaintiffs' evidentiary showing is entirely deficient, and fails on both counts – it establishes neither a prima facie case, nor pretext. Thus, summary judgment is GRANTED in defendants' favor as to this theory of liability.

2. Retaliation

For plaintiff to succeed on a claim for unlawful retaliation under section 1981, she must establish "that [he or she] acted to protect [his or her] rights, that an adverse employment action was thereafter taken against [him or her], and that a causal link exists between those two events." See Steiner v. Showboat Operating Co., 25 F.3d 1459, 1465 (9th Cir.1994). The Ninth Circuit has specifically held that, in order to establish a prima facie case of retaliation, a plaintiff must initially prove (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the two. See Bergene v. Salt River Project Agric. Improvement and

Power Dist., 272 F.3d 1136, 1140-41 (9th Cir.2001). Once established, the McDonnell Douglas framework shifts the burden to the defendant to set forth a legitimate, non-retaliatory reason for its actions, after which the plaintiff must produce evidence to show that the stated reasons were a pretext for retaliation. Id.

Here, plaintiff's lack of evidence extends to her retaliation claim. While plaintiff conclusorily states that she has satisfied all elements of her prima facie claim, see Pl. Opp. Br. at 7:14-24, she fails to submit a single citation to any evidence demonstrating as much. And looking at plaintiff's declaration, it contains only a single paragraph in which plaintiff addresses the prima facie elements of her retaliation claim, and states that unwarranted discipline was taken against her "because [she] continued to complain about the unlawful discriminatory treatment of [her] by Frazier and Hanson to Frazier and Hanson and Willie Ramirez in Human Resources who refused to listen to [her] complaints." See Abram Decl., ¶ 33. Aside from this conclusory statement, there is no identification of any instances in which plaintiff complained of the discriminatory treatment, let alone any details of such protected activity – i.e., dates, persons to whom plaintiff complained, subject of plaintiff's complaints, etc. In other words, once again there is nothing except plaintiff's own conclusion to support her claim that she engaged in any protected activity, or experienced the filing of disciplinary actions against her *because* of such protected activity. For the same reasons noted above, this is insufficient to establish a prima facie retaliation case.

And even if plaintiff had demonstrated evidence going to her prima facie claim, her showing as to pretext, in light of defendants' evidence that a legitimate non discriminatory reason for the disciplinary actions existed, fails for the same reasons identified above.

In sum, therefore, summary judgment is also warranted in defendants' favor as to any retaliation claim asserted by plaintiff.

3. Hostile Workplace Harassment

Unsurprisingly, the third and final theory of liability upon which plaintiff bases her section 1981 claim – hostile workplace harassment – suffers the same fatal defects as the

previous two.

Preliminarily, in order to prevail on a hostile workplace claim premised on race, plaintiff must show: (1) that she was subjected to verbal or physical conduct of a racial or sexual nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of plaintiff's employment and create an abusive work environment. See Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir.1995). The more outrageous the conduct, the less frequent must it occur to make a workplace hostile. See Ellison v. Brady, 924 F.2d 872, 878 (9th Cir.1991). To determine whether conduct is sufficiently severe or pervasive to violate Title VII, the court looks at all surrounding circumstances, including frequency, severity, whether the alleged conduct is threatening or humiliating, or merely an offensive utterance, and whether it interferes with an employee's work performance. See, e.g., Vasquez v. City of Los Angeles, 349 F.3d 634, 649 (9th Cir. 2004). Finally, the allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the same racial or ethnic group as the plaintiff. See Nat'l Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 116 (2002); McGinest v. GTE Service Corp., 360 F.3d 1103, 1115 (9th Cir. 2004).

Here, in response to defendants' claim that there is a lack of evidence supporting plaintiff's hostile workplace claim, plaintiff has stated only that the "substantial credible evidence" in the record belies this argument. Again, however, plaintiff makes no reference to what this evidence is, nor does she provide any detailed explanation of such evidence. Plaintiff's declaration, moreover (assuming it could, standing alone, defeat summary judgment), is utterly devoid of any particularized facts that indicate that plaintiff has suffered any verbal or physical conduct of a racial nature. See generally Abram Decl. ISO Opp. MSJ. Furthermore, defendants have even gone one step beyond merely pointing out plaintiff's lack of evidence, and cited to that portion of plaintiff's deposition testimony in which plaintiff concedes that she never heard Frazier or Hansen make any racial slurs, or talk about black people in a discriminatory fashion. See, e.g., Rolnick Decl. ISO MSJ, Ex.

A at 37-40, 46.

In sum, there is no evidence of any verbal or physical conduct of a racial nature, let alone conduct that was so severe or outrageous that a reasonable person belonging to plaintiff's racial or ethnic group could possibly find that a claim had been stated or proven. The court should find as much as a matter of law, in view of plaintiff's total lack of evidence. Thus, summary judgment in defendants' favor is warranted.

4. Monell Liability

The parties both acknowledge that the City itself can only be held liable for the actions of its employees (i.e., either Frazier or Hansen), if plaintiff satisfies the principles of Monell liability. See, e.g, Monell v. Dept. of Social Serv. of New York, 436 U.S. 658, 690 (1987)(holding that liability against municipality under § 1983 can only attach when a local government's policy or custom is responsible for inflicting injury at the hands of one of its employees); United Federation of African Am. Contractor v. Oakland, 96 F.3d 1204, 1215 (9th Cir. 1996)(applying Monell analysis to suit against municipalities pursuant to § 1981).

A plaintiff satisfies the principles of Monell liability when a plaintiff demonstrates that an "official municipal policy" of some sort caused the constitutional tort in question. As defendants and plaintiff both note here, plaintiff can demonstrate as much in one of three ways: the plaintiff can show that the alleged violation in question was committed by the employee pursuant to a longstanding practice or custom; or plaintiff can show that the employee causing the violation in question has "final policymaking authority;" or plaintiff can show that the employee causing the violation had his or her actions "ratified" by the "final policymaker." See, e.g., Christie v. Iopa, 176 F.3d 1231, 1235-40 (9th Cir. 1999).

Here, plaintiff has submitted no evidence establishing the existence of any official municipal policy. Specifically, plaintiff fails to cite a single piece of evidence that would support the existence of any City custom or policy, Frazier or Hansen's final policymaking authority, or the fact that their actions were ratified by any person or body with final policymaking authority. Indeed, plaintiff's counsel appears to have cut and pasted sections

from a prior unrelated brief in fashioning an opposition to defendants' Monell arguments, which obviates any opposition entirely. While plaintiff's counsel explained the inclusion of unrelated arguments as an unintentional error and argued that Frazier did, in fact, have final policymaking authority, plaintiff's explanatory argument is no substitute for proper evidentiary and legal support.

In short, and consistent with the whole of her case, plaintiff has failed to raise any disputed facts on the issue of the City's Monell liability. Summary judgment is therefor appropriate in defendant's favor on this issue. See, e.g., Okoro v. City of Oakland, California, 233 Fed. Appx. 639, 641 (9th Cir. 2007)(absence of the "essential elements of municipal liability under 42 U.S.C. §§1983 and 1981 is fatal to [plaintiff's] case").

C. Conclusion

For all the foregoing reasons, defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

Dated: October 3, 2008

PHYLLIS J. HAMILTON
United States District Judge